

SAIPAR Case Review

Volume 2
Issue 1 May 2019

Article 7

5-2019

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Recommended Citation

Kaaba, O'Brien (2019) "Kilolo Ng'ambi v Opa Kapijimpanga Appeal No. 210/2015 (Judgment of 9th October 2018)," *SAIPAR Case Review*: Vol. 2 : Iss. 1 , Article 7.

Available at: <https://scholarship.law.cornell.edu/scr/vol2/iss1/7>

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Kilolo Ng'ambi v Opa Kapijimpanga Appeal No. 210/2015 (Judgment of 9th October 2018)

O'Brien Kaaba

Facts

This was an appeal against the High Court decision relating to succession disputes for the Kapijimpanga chieftaincy in North Western Zambia. The incumbent chief died on the throne in 2008. Duly following the traditional succession process, the traditional electoral college (composed of certain members of the royal family) gathered in September 2010 to choose the next chief. Six contenders emerged and were all considered eligible. The electoral college could not agree on which one of them should be chief and the process ended in a deadlock. In consequence, the electoral college executed a written agreement among themselves to enlist a third party, Chief Mujimanzovu, to break the deadlock by choosing one of the six to be the chief. Mujimanzovu, as requested, chose the Appellant, Kilolo Ng'ambi, as the new chief. No reasons are given for the selection, or at least the judgment does not mention any.

Dissatisfied with the decision of Chief Mujimanzovu, the respondent and others asked the High Court to nullify the selection of the appellant, arguing in part that the method of his selection was not in line with the established succession customary law of the Kaonde people. The High Court nullified the selection of the appellant. Considering that this was a novel situation which had not arisen before and for which there were no traditional mechanisms for resolving it, the High Court creatively made the following orders:

1. Stakeholders in the chieftaincy such as indunas and other group leaders, as interested parties and subjects of the chieftaincy without whom there would be no chief, be fairly represented in coming up with a formula, criteria or solution which will assist in resolving any stalemate in the selection process for the Kapijimpanga throne;
2. All eligible candidates be accorded an opportunity to offer themselves as possible successors;
3. The candidates be assessed on presentation of their family trees supported by the official registers of the matrilineal lineage and any other recognized books of historical literature;
4. The whole process be conducted within 90 days of the date of this judgment; and
5. In default of taking all the required necessary steps, any of the parties is hereby granted liberty to apply.

Holding

The Supreme Court set aside the decision of the High Court. It took the capricious and narrow view that since the electoral college, which was entitled under Kaonde customary law to select a chief, asked Chief Mujimanzovu to break the deadlock, the electoral college had 'delegated' its powers to him. The decision of Chief Mujimanzovu appointing the appellant, therefore, stood as he was a delegate of the electoral college. The Supreme Court held that the appellant was, therefore, correctly chosen as the rightful heir to the throne of the Kapijimpanga chieftaincy.

Significance

The case raises important questions about how customary law disputes should be resolved by the courts where existing customary law does not have appropriate mechanisms in place to redress the problem. What should be done if a novel problem arises in the context of customary law and the existing customary law is inadequate to address it? The judgment of the Supreme

Court fails to thoroughly answer that question. Reading the judgment leaves one with a sense that the Supreme Court missed an opportunity to develop clear, well-reasoned and principled jurisprudence that would be a useful guide to similar challenges in future. The decision is unconvincing, amorphous and lacking in rigorous legal analysis.

In disposing of the case, the Supreme Court overwhelmingly relied on the view that the electoral college 'delegated' that responsibility to a third party to help break the deadlock. In holding so, the Supreme Court cited no authority at all, apart from referring to a dictionary to define delegation as follows:

In common parlance, delegated authority is the entrusting some of one's work/function to others. According to the Law Dictionary, delegated authority means the transfer of authority from one person to another. It implies acting on behalf of another for another's benefit. It is apparent, in this case, that the royal families of the Kapijimpanga chieftdom delegated their function to choose a chief to Senior Chief Mujimanjovu after they had reached a deadlock.

There is nowhere else the Supreme Court deals further with this concept in any nuanced manner. It is common knowledge in law that the concept of delegation is not as simplistic as stated by the Supreme Court. At common law the general principle is that power should be exercised by those upon whom it is conferred.¹ A function can only be delegated if the source of power allows for such delegation. Otherwise a delegate cannot delegate: *delegatus non potest delegare*.²

There is nowhere in the judgment that the Supreme Court indicates that the electoral college had power to delegate its function to a third party. Considering that the situation was novel and no similar precedent existed in the customary law of the concerned community, there was, therefore, no basis for assuming that electoral college functions were delegable. The electoral college were mere representatives of the members of the concerned customary law tradition. They exercised power to select the chief on behalf of their people, as delegates of the larger community. When the exercise of that delegated power ended in a deadlock, the delegates did not have the power to do as they wished. It was, therefore, necessary for the court to trace the source of that power and be satisfied that it could be delegated lawfully. This never happened. There was, therefore, no basis in the judgment for assuming that the electoral college lawfully delegated its power. Surely in law delegation is not a blank cheque.

That has been the consistent thread running through the jurisprudence relating to the concept of delegation. For example, in the case of *Reverend Lameck Joshua Kausa v The Registrar of Societies (1977) ZR 195* it was held that power conferred specifically on the Registrar of Societies could not be delegated to his subordinate. By parity of reason, power conferred by the community on the electoral college could, therefore, not be delegated to a third party, as there was no existing customary law that allowed for such delegation.

It is suggested that to resolve the dispute, the Supreme Court could have adopted a more creative approach that recognizes customary law as 'living,' evolving and adaptive and see themselves (the Court) as having a role in developing customary law that is democratized and consistent with constitutional values. This is the approach, for example, the South African

¹ HWR Wade and CF Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014) 259

² *Ibid*, 260

Constitutional Court seems to have taken.³ Although the Supreme Court tersely recognized the adaptive capabilities of customary law, it disavowed any role for the Court in the development of that customary law, stating that 'whether or such solution [appointing a third party to break the deadlock where the electoral college was unable to decide] would be "one off" solution or evolve into a new custom or tradition to address similar situations is for the electoral college to decide.' By so holding, the Supreme Court envisioned no role for itself in the development of customary law and left its development entirely in the fate of social accidents and vicissitudes of history.

This approach taken by the Supreme Court is problematic as it does not allow for customary law to develop in a consistent and principled manner that would be in line with constitutional norms. As former South African Chief Justice, Pius Langa, stated, such an ad hoc approach to the development of customary law is unsatisfactory as 'changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged and there may be different solutions to similar problems.'⁴ Article 7(d) of the Zambian Constitution recognizes customary law as a source of legal norms, subject only to the Constitution. The judiciary, as guardian of the Constitution, has a clear mandate to ensure customary law develops in a manner consistent with constitutional norms and values. The Supreme Court should not have abdicated this mandate.

While it is the responsibility of the court to determine what customary law is or ought to be in line with the constitutional norms, this does not entail the Court imposing its views about particular customary norms. It is the role of the concerned customary community to collectively develop and shape their own customs in responding to new social and economic developments in society. A new practice cannot be considered a binding customary norm by members of the concerned community without internalizing it and considering themselves bound by it. This is akin to Professor HLA Hart's concept of a 'reflective critical attitude.'⁵ That is, the members of the concerned community regard a custom as a common standard of behaviour upon which criticism and demands for conformity would be considered justified.⁶

To have this critical reflective attitude, it is essential 'to respect the right of communities that observe systems of customary law to develop their law.'⁷ This way, the concerned community is, therefore, 'empowered to bring its customs into line with the norms and values of the constitution.'⁸ The importance of this was succinctly stated by the South African Constitutional Court:

...it is important to ensure that customary law's congruence with our constitutional ethos is developed in a participatory manner, reflected by the voices of those who live the custom. This is essential to dispel the notion that constitutional values are foreign to customary law and are being imposed on people living under customary law against their will.⁹

³ See for example, *Nonkululeko Letta Bhe and Others v Magistrate Khayelitsha and Others* Case CCT49/03; *Modjadji Florah Mayelane v Mphephu Ngwenyama and Others* [2013] ZACC 14; and *Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa and Others* [2008] ZACC 9.

⁴ *Nonkululeko Letta Bhe and Others v Magistrate Khayelitsha and Others* Case CCT49/03 [para 112]

⁵ HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1961) 57

⁶ *Ibid*

⁷ *Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa and Others* [2008] ZACC 9 [para 45]

⁸ *Ibid*, [para 73]

⁹ *Modjadji Florah Mayelane v Mphephu Ngwenyama and Others* [2013] ZACC 14 [para 50]

This suggests that the development of a new customary norm is the concern of the wide community who live that custom and should not be left in the hands of a small group, as the Supreme Court effectively decided. The decision of the High Court, which required wider community participation and consensus building in resolving the problem seems consistent with this approach than the position taken by the Supreme Court. The approach taken by the High Court could have ensured democratization of customary law by ensuring that as far as possible, new customary norms would be developed in a more consultative and participatory manner. Such an approach would serve the purpose of fostering constitutional values such as democracy, constitutionalism and good governance as elaborated under Article 8(c) and (e) of the Constitution. That said, it goes without saying that the Supreme Court missed a tremendous opportunity to set clear standards in the evolution of customary law so that its development would be participatory, principled and consistent